BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 41) appears at 39 B. T. A. 251. A supplemental opinion of the Board (R. 151) appears at 40 B. T. A. 181. The opinion of the Circuit Court of Appeals (R. 238) appears at 117 F. (2d) 469.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered March 6, 1941. The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, 28 U. S. Code, Section 347(a), as amended by the Act of February 13, 1925.

Statement of the Case.

A summary statement of the facts is given in the petition at pages 3 to 7 above.

Statute Involved.

Revenue Act of 1926, c. 27, 44 Stat. 9:

> "Section 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
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> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by

trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke, * * *;"

POINT I.

The decision of the Court below is in conflict with the decisions of the Circuit Courts of Appeals in the *Safe Deposit and Trust Co. of Baltimore*, the *Day* and the *Flanders* cases.

While the basis of the Court's opinion is not clear, it is submitted that an analysis of the trust instruments in the light of the other stipulated facts of record demonstrates that the Court's decision is necessarily in conflict with the cases hereinafter discussed.

The vital premise of fact upon which exclusion of the value of the remainder interest under the trust from the settlor's gross estate must rest is that at the time of his death the settlor possessed no power either to cause an invasion of the remainder interest for the benefit of Robert, the life tenant, or to shift the remainder interest from one remainderman to another. It is submitted that this the settlor could not do.

The decedent could, it is true, increase Robert's annual life income up to the full amount of the income of the trust and could also decrease it to zero. But we concede that the value of Robert's life interest is includible in the gross estate. If the trustee had received any distributions upon the stock and securities held in corpus which were designated by the payor thereof as a return of capital, the settlor could cause such moneys to be paid over to any beneficiary. But this and all other reserved powers were subject to the overriding restriction that

they must not be exercised in such a way as to frustrate the essential purpose of the trust, which was to provide for Robert, Robert's children and their descendants, or so as to impair the substantial integrity of the trust fund. Decedent was thus effectively prevented from invading the corpus for Robert's benefit. If the power to cause the limited class of distributions to be paid over to any beneficiary still had any meaning in the face of the foregoing restrictions, there was not more than $46,500 at the date of death upon which the power could have been exercised. This fact goes to the valuation of Robert's life interest rather than to the legality of the inclusion of the value of the whole remainder interest in the settlor's gross estate. It is necessary to draw the line for estate tax purposes between the property the decedent could take away from the remainderman and the property beyond decedent's reach. We firmly believe that at most the amount of corpus subject to change of enjoyment at the date of the decedent's death was not more than $46,500, and even as to this small amount we submit that decedent's power was so hedged about as to be wholly nugatory.

Decedent possessed no power whatsoever to distribute the corpus outright to Robert (except possibly to the extent of $46,500 as above indicated), nor did he have the ability to cut down by indirection the value of the remainder interest. He could increase the latter by reducing the amount of income annually payable to Robert, but that by itself would not require taxing the whole value of the remainder as part of the decedent's gross estate. If he exercised his reserved power to effect a final distribution to beneficiaries and so to terminate the trust, Robert's life estate would end and the remainder would vest. But the line between the life interest and the remainder interest could not thereby be crossed.

A power in the decedent-settlor to shift the enjoyment

of the remainder interest within the remainder class was equally absent at the date of decedent's death. There was then only one remainderman in existence, Robert's child Cordova, and Cordova had no descendants. There was no way in which his remainder interest could be reduced or shifted to someone else, for there was no other remainderman in existence to receive it and the creation of new beneficial interests was forbidden by the trust instrument.

The instant situation thus presents a transfer made subject to a power to change enjoyment where at the date of death no change could be made with respect to the remainder.

The Circuit Court of Appeals for the Fourth Circuit, in *Tait* v. *Safe Deposit and Trust Co. of Baltimore,* 74 F. (2d) 851 (1935), had before it the trust of a decedent in which the settlor had reserved power to alter, exercisable only upon his wife's predeceasing him. She survived the settlor. The question was whether the value of the corpus of the trust should be taxed as part of decedent's gross estate. The Court held that the mere cessation of a contingent power at death was not enough to require the inclusion of the value of the trust in decedent's gross estate.

The Circuit Court of Appeals for the Third Circuit in *Day* v. *Commissioner,* 92 F. (2d) 179 (1937), passed upon the trust of a settlor in which he had reserved the power to alter, exercisable only upon his daughter's majority. The settlor died during the daughter's minority. The question for decision was whether the value of the trust corpus was part of the decedent's gross estate. The Court, in holding the value of the trust not includible, held that there must be a present power to alter, amend or revoke in order to tax the estate upon the value of the trust.

The Circuit Court of Appeals for the Second Circuit, in *Commissioner* v. *Flanders,* 111 F. (2d) 117 (1940), was confronted with a trust wherein the settlor retained power

to consent to a sale of corpus free of the trust only if an emergency arose in the affairs of the Singer Company, whose stock comprised the corpus. No emergency had arisen at the date of the settlor's death. The Court excluded the interest from the gross estate on the ground that the existence of a power, exercisable only on a contingency which never arose, was not legally sufficient to require inclusion of the value of the trust in the gross estate.

The decision of the Court below that the entire value of the trust must be included in the decedent's gross estate is thus, we submit, in sharp conflict with the three above-cited cases.

POINT II.

The decision of the Court below conflicts with the principle of this Court's decision in *Porter* v. *Commissioner.*

In *Porter* v. *Commissioner,* 288 U. S. 436 (1933), this Court enunciated the principle that an interest transferred during life by the decedent is legally part of his gross estate only if the death of the decedent is, as to such interest, "the source of valuable assurance passing from the dead to the living". No such assurance passed to the remainderman here upon his grandfather's death. The remainder interest given him by the trust instrument became completely vested and unalterable when two events entirely unconnected with decedent's death occurred, namely, the death of the son's other child and the son's divorce from his second wife.

The decision below is plainly in conflict with this principle and is also out of line with the trend of the cases already decided upon this point.

Respondent, in his brief submitted before the Court below, contended that the case of *Helvering* v. *Hallock,*

309 U. S. 106 (1940), required the inclusion in decedent's gross estate of the entire value of the trust estate. The Court below did not even discuss the *Hallock* case. That case has no application here, and does not dispense with the necessity for the issuance of a writ of certiorari. In the case at bar, the trust provided that the remainder interest went to the children of Robert, or their descendants *per stirpes*, or their appointees, 20 years after Robert's death. Only if all the named takers failed was the property to revert to the decedent-grantor or his estate. The death of the settlor had nothing to do with this failure. In the *Hallock* case, on the contrary the death of the decedent was the "indispensable and intended event" [*Klein* v. *United States*, 283 U. S. 231 (1931)] which brought the remainder interest into being. See *Commissioner* v. *Flanders*, 111 F. (2d) 117 (1940).

POINT III.

This Court has not yet passed upon the question of whether a transferred interest subject to change through a power which is, however, impossible of exercise at the date of death, should be included in a decedent's taxable gross estate.

The result of the decision below will be to subject decedents' estates to taxation in situations where the decedent has parted with all interest in and powers over property transferred in trust, a consequence which is forbidden by the letter and spirit of Section 302(d) of the Revenue Act of 1926. The question is thus one of general importance in the administration of the Federal estate tax and should be reviewed by this Court.

Conclusion.

This case involves a matter of general public interest and importance in the administration of the Federal estate tax law which has been decided by the Court below in conflict with the decisions of other Circuit Courts of Appeals and in conflict in principle with the *Porter* case. The question should consequently be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

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